UNITED NATIONS

AT

Administrative Tribunal

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1 November 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 537

Case No. 546: UPADHYA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, First Vice-President; Mr. Ahmed Osman, Second Vice-President;

Whereas, on 11 April 1990, Shail Upadhya, a staff member of the United Nations, filed an application containing the following pleas:

"II. PLEAS

Applicant seeks:

Retroactive wages and benefits at the D-1 level less wages and benefits received from no later than the date of confirmation of the appointment which was denied to Applicant.

Damages for the continuing hindrance to the development of Applicant's career.

Judgement ordering Respondent to find a suitable post for Applicant at the D-1 level."

Whereas the Respondent filed his answer on 10 December 1990;

Whereas the Applicant filed written observations on 15 March 1991;

Whereas the Applicant requested oral proceedings on 29 March 1991;

Whereas, on 6 August 1991, the President of the Staff Committee of the United Nations filed, with the permission of the Tribunal, an Amicus Curiae brief on behalf of the United Nations Staff Union;

Whereas the Applicant submitted an additional written statement on 12 August 1991;

Whereas, on 23 September 1991, the presiding member of the panel has ruled that no oral proceedings would be held in the case;

Whereas the Respondent submitted observations on the Amicus Curiae brief of the United Nations Staff Union on 23 September 1991;

Whereas the Applicant filed a supplement to his application on 7 October 1991;

Whereas the facts in the case are as follows:

In its Judgement No. 401 rendered on 12 November 1987 in favour of the Applicant, a Senior Political Affairs Officer (P-5) of the United Nations, the Tribunal, having found that the Administration had acted in derogation of the Applicant's rights stemming from a determination of unfair treatment made by the Panel to Investigate Allegations of Discriminatory Treatment in the United Nations Secretariat, awarded compensation in the amount of $12,000 to the Applicant for the injuries he had sustained. The Tribunal further urged strongly that in the future the Administration monitor carefully the Applicant's career to ensure not only that it was in no way prejudiced by the events which had given rise to the proceeding, but that he received the fair treatment to which he was entitled.

In 1988 the post of Chief of the International Security and Regional Affairs Section, a D-1 post, became vacant in the Political Affairs Division of the Department of Political and Security Council Affairs. Its vacancy was announced in Vacancy Announcement 88-P-PSC-267-NY. Staff members at level D-1 or P-5 were eligible to apply. The Applicant and other staff members applied for the post. The selection for the post was conducted under the Vacancy Management and Staff Redeployment system established under Secretary-General's Bulletin ST/SGB/221 of 22 December 1986 and Administrative Instruction ST/AI/338 of the same date (and its addenda).

According to this administrative instruction, the system was designed to fill through redeployment essential posts that were vacant as a result of the recruitment freeze or projected to become vacant in the near future, but

it was only the first step towards establishing a more rational human resources management system and towards a more comprehensive procedure that would involve a thorough review of all posts in the context of measures being taken to streamline and rationalize the Organization. Under the new system, all posts vacant or expected to become vacant would be reviewed by departments and offices to determine which posts were essential in order to meet programme mandates; all vacancies to be filled would be advertised and qualified staff members would be invited to apply, including those serving within the office where the vacancy was located; the candidates would be reviewed and evaluated by a Redeployment Committee - whose functions would be initially entrusted to the Appointment and Promotion Board at Headquarters for posts in the Professional category and above - which would recommend a short list of staff members determined to be the best qualified for each vacancy; and the short list of candidates would be communicated to the heads of department or office concerned, who would then make the final selection. However, as the 1986 promotion review was already under way, vacant posts already identified for staff members recommended for promotion would not be included in the review described above.

All applications for the post of Chief of the International Security and Regional Affairs Section were accordingly forwarded to the Appointment and Promotion Board which, at its 1524th meeting held on 16 March 1989, short-listed six candidates, including the Applicant, and decided that their names should be transmitted to the Department for final selection. Such transmission was effected on the following day by the Office of Human Resources Management in a memorandum from which it appears that four of the six candidates had more seniority in grade than the Applicant. On 3 April 1989 the Office of Human Resources Management informed the Applicant that, after careful evaluation of his application for the vacancy, he had not been selected for the post.

On 27 April 1989 the Applicant requested the Secretary-General to review and reverse the decision not to appoint him to the D-1 position; should that request be denied, he asked for the Secretary-General's consent to bring the matter to the Tribunal directly inasmuch as the issue presented was whether the Tribunal's decision in Judgement No. 401 had been implemented and inasmuch as the Tribunal's reference to monitoring his

career was tantamount to retaining jurisdiction for the purpose of supervising implementation of an ongoing remedy. Both requests were denied in a letter dated 1 June 1989 from the Assistant Secretary-General for Human Resources Management to the Applicant; concerning the request for the Secretary-General's consent to direct submission of the Applicant's case to the Tribunal, the Assistant Secretary-General stated that since the case arose from a new and separate set of facts from those in Judgement No. 401, waiver of the Joint Appeals Board proceedings would not be appropriate. On 1 July 1989 the Applicant lodged an appeal with the Joint Appeals Board.

The Joint Appeals Board submitted its report on 11 December 1989. The Board's conclusions and recommendations read as follows:

> "Conclusions and Recommendations
>
> 34. Firstly, the Panel concludes that the appellant's claim to the contested D-1 post in his Department on the basis of an alleged lack of implementation of Administrative Tribunal Judgement 401 was without foundation.
>
> 35. Secondly, the Panel concludes that the Vacancy Management and Redeployment System was introduced without the concomitant formal suspension or amendment of the relevant Staff Rules governing promotion. Thus, the provisions of staff rule 104.14 are still in effect.
>
> 36. Thirdly, the Panel concludes that the appellant did not show that he would have been promoted against the contested D-1 post if staff rule 104.14(f)(iii) had been adhered to. However, the appellant has been deprived of the right to be selected by an independent body established after consultations with the appropriate staff representative body, as set out in staff rule 104.14(f)(iii)(a), (b) and (c).
>
> 37. Accordingly, the Panel recommends that the appellant be awarded the sum of $1.00 in compensation for the fact that he has been deprived of one of his rights under staff rule 104.14.
>
> 38. The Panel makes no further recommendation in support of the appeal.
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> 39. The Panel recommends that the Administration review any inconsistencies between the Vacancy Management System and the provisions of staff rule 104.14 and resolve these, either by amending the Staff Rules or adjusting the guidelines governing Vacancy Management."

On 13 February 1990 the Acting Under-Secretary-General for Administration and Management communicated the Secretary-General's final decision to the Applicant in a letter reading in part:

> "...
>
> The Secretary-General has re-examined your case in the light of the Board's report. With regard to your claim for selection to the post in question, it should be noted that qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy. The Secretary-General noted that your application, and that of other qualified staff, was fully and fairly considered by the Appointment and Promotion Board under the Vacancy Management and Staff Redeployment System in accordance with the Secretary-General's Bulletin ST/SGB/221 and Administrative Instruction ST/AI/338 and Addenda 2, 3 and 5. The official record clearly shows that at all stages of the selection process the vacancy management procedures were strictly observed.
>
> The Secretary-General, as Chief Administrative Officer, introduced the Vacancy Management System, after consultation with the staff, as an appropriate measure to deal with an emergency situation. The Organization has been operating under the Vacancy Management System since 22 December 1986 when the Secretary-General promulgated it in ST/SGB/221 and ST/AI/338, and it thus became part of your conditions of employment.
>
> The Secretary-General has accordingly decided to maintain the contested decision and to take no further action on your case."

On 11 April 1990 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Although the Joint Appeals Board held unanimously that the Vacancy Management System had been introduced without formal suspension or amendment of the staff rules governing promotion and that the Applicant had been deprived of the right to be selected by an independent body established after consultations with the appropriate staff representative body,

(a) The Board, by recommending token compensation, failed to exercise jurisdiction and disregarded the principle that reparation must, as far as possible, wipe out all the consequences of the illegal act;

(b) The Respondent, in his final decision, refused to state whether he was accepting or rejecting the Board's report.

2. The putative greater seniority of four candidates for the post in question was arrived at by virtue of years of delay on the part of the Administration in dealing with the Applicant's case, and the earlier judgement of the Tribunal did not compensate adequately the Applicant for all these ills. Nor is the existence of discrimination retroactively erased by the mere payment of $12,000. The Administration is under a continuing duty to see that the Applicant is treated fairly.

3. Consideration of the Applicant's candidacy did not meet the standards set by the Tribunal in the Williamson case nor the minimum standard of "fair treatment" insisted upon by the Tribunal in the earlier judgement.

Whereas the Respondent's principal contentions are:

1. Promulgation of a temporary Vacancy Management System by means of a Secretary-General's Bulletin and subsidiary administrative instructions was a valid exercise of the Secretary-General's discretionary powers to deal with an unprecedented financial crisis:

(a) The Secretary-General had the authority to promulgate the Vacancy Management System through a Secretary-General's Bulletin and administrative instructions;

(b) The Vacancy Management System was introduced after consultation with staff;

(c) The Vacancy Management System was reported to the General Assembly.

2. Continuation of the Vacancy Management System until completion of negotiations for a new promotion system with the staff pursuant to Chapter VIII of the Staff Regulations and Rules to amend the Staff Rules does not violate the Applicant's rights.

3. Implementation of the Vacancy Management System did not violate the Applicant's acquired rights, as promotion procedures are statutory in nature and subject to change.

4. The staff did not have any automatic right to an annual review and to promulgation of promotion registers under the prior promotion system. Suspension of that system therefore did not violate any rights of the staff.

5. The Applicant received under the Vacancy Management System the full consideration to which he is entitled.

6. Recommendations of the Joint Appeals Board are not binding on the Secretary-General.

The Tribunal, having deliberated from 15 October to 1 November 1991, now pronounces the following judgement:

I. The Applicant challenges a decision by the Respondent dated 13 February 1990 not to select him for promotion to a D-1 post. In challenging this decision, the Applicant draws in question the validity of the Vacancy Management System established by the Respondent in accordance with Secretary-General's Bulletin ST/SGB/221 and Administrative Instruction ST/AI/338 issued on 22 December 1986, and subsequent addenda 2, 3 and 5 to that Administrative Instruction. The Applicant also asserts ongoing damage to the development of his career as a result of continued implementation of the Vacancy Management System, and that the decision appealed from represents a failure by the Respondent to abide by paragraph IX of Judgement No. 401 rendered by the Tribunal on 12 November 1987. The Tribunal will examine these points.

II. As to the latter claim, the Tribunal, in agreement with the Joint Appeals Board, finds no basis for concluding that the rejection of the Applicant for the D-1 post in question represented any lack of implementation of Judgement No. 401. That Judgement, in paragraph IX, did not call for more than future monitoring of the Applicant's career to avoid its being prejudiced by the events which gave rise to Judgement No. 401, or for the Applicant to receive more than the fair treatment that other staff

members are entitled to. The Tribunal expects that the Respondent will act in accordance with the said paragraph IX. It has not been established that the Applicant's non-selection for the D-1 post was related to the events which gave rise to Judgement No. 401, or reflected retaliation.

III. As to the Vacancy Management System, the Joint Appeals Board unanimously concluded that the System was introduced without a formal suspension or amendment of the relevant Staff Rules governing promotion and that therefore the provisions of staff rule 104.14 were still in effect. Although, as the Tribunal noted previously in Judgement No. 507, Fayache (1991), paragraph III, the Vacancy Management System was accompanied by some degree of confusion in its initial implementation, the Tribunal does not agree with the view of the Joint Appeals Board that a "formal" suspension or amendment of the relevant Staff Rules governing promotion was required in order for the Vacancy Management System to become effective. In this regard, the Tribunal agrees with the contention of the Respondent that the introduction of the Vacancy Management System could not reasonably have been understood as anything other than a temporary suspension of staff rule 104.14 as an emergency measure.

IV. The explanations of the proposed Vacancy Management System which were provided to staff representatives in the unfortunately abbreviated consultations which occurred shortly before 22 December 1986, as well as the contents of Secretary-General's Bulletin ST/SGB/221 and Administrative Instruction ST/AI/338, described a system that was so plainly incompatible with the annual promotion review and promotion register system described in staff rule 104.14 that no one could reasonably have failed to understand that the effect of the Vacancy Management System was, in the absence of a revocation of staff rule 104.14, a suspension of its provisions.

V. Moreover, contrary to the impression of the Joint Appeals Board that "only sketchy and general information on the system" had been furnished to the General Assembly by the Respondent with respect to the Vacancy Management System, the Tribunal finds that the reports of the Secretary-

General to the General Assembly set out the essential features of the Vacancy Management System with sufficient clarity to inform the General Assembly of how it would operate. From this, the General Assembly could not have escaped understanding that staff rule 104.14 was temporarily being suspended as part of the Secretary-General's emergency efforts to deal with the Organization's financial crisis.

VI. For example, in 1987, in his report to the General Assembly A/42/234 the Secretary-General stated in paragraphs 56-58 and 66(2)(g):

> "56. A further drawback to the recruitment freeze is that it is a blunt instrument, which operates haphazardly and further distorts the geographical distribution of the Secretariat, whenever staff happen to leave the Organization, for whatever reason. It thus leads inexorably to an increasingly irrational distribution of resources in relation to programme needs, just at the time when those resources need to be husbanded more carefully because they are declining. In the present circumstances I remain convinced that, out of fairness to the staff, the reduction of posts must be achieved to the maximum extent through attrition. Furthermore, the Organization does not have the wherewithal to meet the considerable financial outlays required to offer early retirement which, I believe, can be desirable in some instances, or to offer agreed termination to staff in contractual status.
>
> 57. In order to counteract the adverse effects of a continuing recruitment freeze and the process of attrition, I introduced, in December 1986, a new system of vacancy management and staff redeployment. There are two main objectives: to identify existing current vacancies which it is essential to fill in order to fulfil key programme mandates; and to redeploy to those essential posts staff occupying posts considered of less vital importance in the present contingency.
>
> 58. While this is essentially an emergency measure to alleviate the immediate impact of the financial crisis, it has been designed in such a way that it can logically lead into the phased retrenchment, linked to restructuring, required by the report of the Group of High-level Intergovernmental Experts. It will also pave the way for a more rational and equitable system of career development and of planned job rotation as posited in recommendation 49.
>
> ...

66(2)(g). A vacancy management and staff redeployment plan has been introduced to ensure the optimum distribution of the reduced staffing resources available in relation to the requirements of the mandated programmes, and build the foundations of a more equitable and effective system of career development ..."

VII. In the annex to that report, it is stated in paragraphs 28, 32 and 33:

"28. Also in response to recommendation 41, the name of the Office of Personnel Services has been changed to the Office of Human Resources Management. (Footnote omitted) The steps that have already been taken in this direction include recruitment planning, classification of posts, advertising of vacancies up to the D-1 level, competitive examinations (for external recruitment at the junior Professional levels and for promotion to these levels of staff from other categories) and, most recently, the development of career planning mechanisms on the basis of occupational groups. These mechanisms are already in place for staff in the General Service and related categories at Headquarters and will be set up in the near future for staff in the Professional category and above and for staff in the General Service and related categories at other duty stations. At the same time, more transparent methods of selection for appointment and promotion have been introduced. For instance, the system of vacancy management and redeployment of staff recently introduced to fill essential posts now vacant as a result of the recruitment freeze (footnote omitted) ensures, in particular, that staff are selected for vacant posts through a process involving a review by the appointment and promotion machinery.

...

32. As mentioned previously (see paras. 67-68 of the report and para. 28 of the present annex), the recently initiated vacancy management system reviews vacant posts to determine which should be filled, in the light of programme priorities, work-load and classified job descriptions. As part of the review called for under recommendation 15 (see paras. 68-73 of the report), a post-by-post review is being undertaken in each department and office in light of programme priorities, legislative mandates and the restructuring of the Secretariat to achieve the desired staffing profile for the Secretariat in 1990.

33. Thereafter the Secretary-General will consider instituting permanent mechanisms to deal with vacancies in the light of programme orientation and changing mandates, as may be decided by the legislative bodies, to ensure efficient use of resources as proposed in recommendation 56. Candidates for the vacant posts deemed essential will be reviewed by the appointment and promotion bodies, which will establish a short list of candidates from which programme managers will select the staff member to be assigned to the vacancy in their area."

VIII. In 1988, in his report A/43/286 the Secretary-General stated in paragraphs 78 and 80:

"78. The staff redeployment programme is being refined and should form the basis for a future rotation system. By advertising secretariat-wide vacancies open to internal candidates only, the programme enables qualified staff members from all duty stations to be considered for posts in their area of expertise. They are then reviewed by a joint staff-administration advisory body, which guarantees an objective and fair review. Thus, a number of staff members have been reassigned to a different duty station. The experience of other agencies in the common system with rotation schemes is being studied with a view to developing an approach corresponding to the specific needs of the United Nations Secretariat.

...

80. Specific criteria have been developed for the redeployment of staff to higher-level posts and for their promotion and have been communicated to the appointment and promotion bodies. Special criteria for the promotion of women have recently been extended to the vacancy management and staff redeployment programme. These criteria should together form the basis of a new promotion system based on open competition and clear requirements for each posted vacancy. The role and structure of the appointment and promotion bodies themselves are also under review."

IX. In 1989, in his report A/44/222 the Secretary-General stated in paragraphs 150, 152, 155 and 156:

"150. To facilitate the reassignment of staff to other functions, the Group of High-level Intergovernmental Experts recommended the recruitment of staff in the context of occupational groups. The Secretary-General endorses this approach. In fact, the recruitment of staff at

P-1/P-2 levels through competitive examinations by occupational group rather than by post is now firmly established and has been found to be very beneficial both to the Organization and to staff. Furthermore, the introduction of the vacancy management and staff redeployment programme on 22 December 1986 has ensured that the selection of staff for vacant posts is guided by occupational considerations, in that candidates with relevant qualifications regardless of duty station or departmental affiliation are considered, whereas under the promotion review conducted prior to the introduction of the vacancy management system, candidates were being compared to other staff members in the same organizational unit (department or office). The proposed career development plan is also based on occupational groups.

...

152. Job rotation among duty stations for Professional staff has been recommended. The vacancy management and staff redeployment system, which was announced in December 1986 and implemented in 1987, is one of the measures taken to increase job rotation and staff mobility in general. Since the introduction of vacancy management, a total of 57 staff members in the Professional category (33 per cent of all internal placement cases) have moved from one duty station to another. As a further measure to facilitate staff mobility, the Secretary-General has approved enhanced entitlements upon assignment or transfer to hardship duty stations.

...

155. Criteria for the promotion of staff have been developed in the context of the vacancy management and staff redeployment system, which is now fully operational. Detailed guidelines were also established for the selection and placement of staff under this system. The criteria are based on open competition and the matching of the candidate's qualifications with the requirements of the vacant post in the context of the relevant occupational group. Under this system, a candidate who has been selected for a higher-level post is promoted after six months of satisfactory service. As at 1 March 1989, 53 staff members have already been promoted under this new system and 85 staff members who have been selected for higher-level posts will be promoted in the next six months subject to satisfactory performance.

156. The existing appointment and promotion machinery is used to process the selection and promotion of candidates under the new vacancy management system. The possibility

> of restructuring the appointment and promotion machinery along occupational lines was considered but it was found that it would be administratively very cumbersome and would not bring particular benefits. The members of the appointment and promotion bodies, with their diverse occupational backgrounds, are able to make sound and objective judgements as regards the professional and technical qualifications of the candidates under review, provided the requirements are clearly stated and the qualifications of the candidates are well documented."

X. It may be noted that in paragraph 150 of his 1989 report A/44/222, the Secretary-General emphasized the difference between the functioning of the Vacancy Management System and the promotion review system prior to the introduction of the Vacancy Management System, a point which could have come as a surprise to no one. Indeed, as early as 2 December 1986, at a consultation meeting with the staff, it was recognized that the promotion register system was not expected to function as in the past (see attachment to the Amicus Curiae brief of the Staff Union, pp. 12-13). And in paragraph 155 of that report, further reference was made to the promotion process being governed by the Vacancy Management System. In paragraphs 28, 32 and 33 of the annex to the Secretary-General's 1987 report A/42/234, it was made quite clear that promotions would be subject to the Vacancy Management System and that the appointment and promotion bodies would perform only a screening function to establish a short list of candidates to fill vacancies from which programme managers would make final selections. Similarly, paragraphs 78 and 80 of the Secretary-General's 1988 report A/43/286 showed the General Assembly that the Vacancy Management System dealt with promotions in a manner quite different from staff rule 104.14.

XI. In response to each of the 1987, 1988 and 1989 reports of the Secretary-General, the General Assembly's reaction was to reiterate its support for the Secretary-General in the fulfillment of his responsibilities as Chief Administrative Officer. To be sure, none of these General Assembly resolutions reflected a decision with respect to the applicability or effect of article XII of the Staff Regulations on the Vacancy Management System, but, as indicated below, since the financial emergency which precipitated the Vacancy Management System was continuing, the authority of the Respondent

to maintain the Vacancy Management System also continued. Thus such resolutions do not have a binding effect on the staff as did resolutions of the type involved in, for example, Judgements No. 67, Harris et al (1956), para. 5; No. 236, Belchamber (1978), para. XVI; or No. 249, Smith (1979), para. VII. Nevertheless, if the General Assembly had regarded the actions of the Respondent during that emergency period as not being within his authority as Chief Administrative Officer or as necessitating the submission of new Staff Rules, it would presumably have made this known in one or more of these resolutions. Yet, there was no such indication on the part of the General Assembly.

XII. However, it does not follow from the foregoing that the necessary implication to be drawn is that the requirements of article XII of the Staff Regulations have been complied with or have been waived by the General Assembly. Without regard to any conclusions that might be drawn from the reports and resolutions discussed above, the Tribunal considers that, faced with a financial crisis, the emergency action taken by the Respondent in adopting and continuing in effect for the duration of the emergency the Vacancy Management System, which is not in conflict with any Staff Regulation, as well as the concomitant temporary suspension of staff rule 104.14 by virtue of Administrative Instruction ST/AI/338, was within the Secretary-General's authority as Chief Administrative Officer. Such an emergency action is not within the competence of the Tribunal to rescind. See, e.g., Judgement No. 237, Powell (1979), paras. XIII and XVII. Indeed, the Staff Union's Amicus Curiae brief submitted in this case concedes that the Secretary-General may take appropriate administrative action on a temporary or provisional basis to meet an emergency situation. Since the Vacancy Management System was instituted prospectively and the suspension of staff rule 104.14, as well as the related recourse procedure (both of which are of a statutory nature), were not retroactive in effect, no issue of acquired rights is presented. See, e.g., Judgement No. 266, Capio (1980).

XIII. It follows from the foregoing that the Tribunal does not find either the adoption of the Vacancy Management System by the Secretary-General as a temporary emergency measure and its continuation for the duration of the

emergency, or the accompanying implicit suspension of staff rule 104.14, as being outside the Secretary-General's discretionary authority as Chief Administrative Officer. Consequently, the Applicant's claims based on his contention that he was improperly deprived of consideration for promotion under the annual promotion register procedure provided for by staff rule 104.14 must fail.

XIV. The Tribunal notes the Respondent's statement that the emergency which gave rise to the Vacancy Management System ended at the close of 1989. However, the Tribunal has not been informed of any action taken by the Respondent to end the suspension of staff rule 104.14. Nor has the Tribunal been informed that a staff rule dealing with the Vacancy Management System has been duly promulgated or submitted to the General Assembly under article XII of the Staff Regulations.

XV. Since the application also challenges the ongoing effect of the Vacancy Management System on the Applicant's career, an issue addressed in general terms in the Amicus Curiae brief of the Staff Union, the Tribunal turns to that aspect of the case. The Organization is no longer in the emergency precipitating the Vacancy Management System. In view of this, the Tribunal considers that the suspension by Administrative Instruction ST/AI/338 of staff rule 104.14, a rule of major importance to the career of staff members, which was effected to establish the Vacancy Management System as a temporary emergency measure, cannot be continued indefinitely without conflicting with staff regulations 12.2 and 12.3. Cf. Judgement No. 237, Powell (1979). The purpose of those staff regulations and the rights of the staff would be seriously impaired by indefinite suspension of Staff Rules and their indefinite replacement by norms neither promulgated as Staff Rules nor submitted to the General Assembly for its review as contemplated by staff regulations 12.3 and 12.4.

XVI. In the circumstances here, the Tribunal finds that, upon the ending of the emergency, the Respondent had to end the temporary suspension of staff rule 104.14 or comply with article XII of the Staff Regulations within a reasonable period. The Tribunal considers that such a reasonable period will end three months after the date of notification of the judgement herein.

XVII. The Tribunal notes that during its forty-fifth session in 1990, after the emergency ended, the General Assembly received as in prior years a report from the Secretary-General (A/45/226) in which he again drew to the attention of the General Assembly, in paragraph 189, matters relating to the Vacancy Management System, and that the General Assembly, in its resolution 45/239, part A I, paragraph 17 requested:

> "... the Secretary-General to continue efforts to develop further and refine classification and evaluation systems and promotion procedures as an integral part of the vacancy management system ... and to report thereon to the General Assembly at its forty-seventh session."

XVIII. In the opinion of the Tribunal, neither the language of that paragraph nor, as noted above, any of the prior General Assembly resolutions touching upon the Vacancy Management System can be considered a decision by the General Assembly intended to modify or affect the application of article XII of the Staff Regulations to the current suspension of staff rule 104.14 or to the implementation of the Vacancy Management System.

XIX. The Joint Appeals Board also considered whether the Vacancy Management System procedures were applied in a fashion which discriminated against the Applicant in the actual selection in 1989 of a more senior candidate for the D-1 post. In agreement with the Joint Appeals Board on this issue, the Tribunal finds, after reviewing the facts, that the Applicant failed to establish discrimination against him in the selection process under the Vacancy Management System procedures.

XX. The Tribunal notes that on 24 August 1990 the Applicant in case No. 566 (Mr. Al-Atraqchi) submitted to the Joint Appeals Board the following document dated 23 August 1990 and signed by nine staff members, including Mr. Upadhya:

> "With regard to the D-1 post No. 88-P-PSC-267-NY, in PSCA [Political and Security Council Affairs], the following staff members, some of whom had applied for the post, would like to state that they were already aware, even before the vacancy announcement was advertised, that this D-1 post was earmarked for Mr. Nicolae Ion, who was

eventually selected to fill the said post and, unfortunately, this seems to be the established policy in filling vacancies in the Department."

Although this alleged impropriety is said to have occurred well before the selection in 1989 of the successful candidate and the Applicant was among the staff members who made the allegation in the Al-Atraqchi case, thus establishing that he was aware of it before the selection, the Applicant (Mr. Upadhya) made no mention of this in his case before the Joint Appeals Board or in his application to the Tribunal. The allegation of impropriety was brought to the attention of the Joint Appeals Board in the Al-Atraqchi case, as noted above, and then was mentioned for the first time by the Applicant in his written observations in the present case, after the Joint Appeals Board issued its report in the Al-Atraqchi case recommending that the allegation be investigated. Since this matter was not raised by the Applicant before the Joint Appeals Board, the Tribunal cannot address it further.

XXI. For the foregoing reasons, the Tribunal:

1. Subject to paragraph XVI above, rejects the Applicant's plea that the Vacancy Management System was invalid at the time of the contested decision.

2. Rejects all other pleas of the Applicant.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
First Vice-President

Ahmed OSMAN
Second Vice-President

New York, 1 November 1991

Jean HARDY
Acting Executive Secretary